No. 1584.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The California Development Company,
Appellant,
vs.
The New Liverpool Salt Company, (a corporation),
Appellee.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF SOUTHERN CALIFORNIA.

CLOSING BRIEF OF APPELLANT.

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STATEMENT.

It is conceded that inasmuch as the suit was brought on the equity side of the court, the decree must be reversed and the bill dismissed unless it be established that under the allegations and proof, complainant was at the time of the commencement of the suit, entitled to equitable relief.

It will not be attempted by present counsel in this brief to add to the convincing argument contained in the

opening brief of counsel for the appellant upon the two propositions,

First: That the destruction of complainant's property was not occasioned by the act of the defendant, but by the act of God; and

Second: That the jurisdiction of the Circuit Court sitting as a court of equity did not draw to it the cognizance of the damages.

But, it will be earnestly insisted that, conceding defendant's liability for the inundation of complainant's property, nevertheless, under the allegations of the bill and the proofs, complainant was not at the time of the filing of the bill entitled to injunctive relief, and that therefore the decree should be reversed and the bill dismissed.

The allegations of the bill with respect to the diversion of the waters of the Colorado river by the defendant are interpreted and controlled by paragraph 12, which appears at page 67 of the transcript of record.

While it is alleged in paragraphs 5, 7 and 8 that the defendant at the time of the commencement of the suit, was diverting waters from the Colorado river in such manner and quantity as to establish a lake in the Salton Sink, and destroy complainant's property and business, it is in said paragraph 12, alleged as follows:

"That defendant, in the construction of its said in-
"takes, has made no provision whatsoever for the control
"or regulation of the amount of water diverted by it into
"said intakes, and unless it be required to construct head-
"gates for the controlling and regulating of the amount
"of water flowing into its said canal, the said water will

"continue to flow through said canal in amounts greatly "in excess of that required for any proper use, and will "flow into the said lake and upon the lands of complain- "ant and destroy and ruin the property and business of "said complainant."

The intakes referred to in said paragraph are the three intakes which it is alleged in paragraph 5 that the defendant constructed for the purpose of diverting the waters of the Colorado river into its canals. It fol lows therefore from the allegations of the bill, that the diversion complained of will necessarily continue, with the consequent destruction of complainant's property, unless the defendant, by process of court, be compelled to close such intakes or construct headgates.

It further follows that any injunction would be ineffective and futile, unless such injunction, either directly or indirectly, should require the defendant to construct headgates or close the intakes.

It is respectfully contended that the complainant was not entitled to injunctive relief at the time of the filing of the bill, for the following reasons:

I.

THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA HAD NO JURISDICTION TO DECREE AN INJUNCTION IN EFFECT ABATING A NUISANCE CAUSED BY THE CONSTRUCTION OF INTAKES IN THE REPUBLIC OF MEXICO.

II.

THE CIRCUIT COURT HAD NO JURISDICTION TO COMPEL THE DEFENDANT TO CONSTRUCT HEADGATES

IN THE REPUBLIC OF MEXICO FOR THE REASON THAT THE DEFENDANT WOULD NOT HAVE BEEN PERMITTED BY THE LAWS OF THE REPUBLIC OF MEXICO TO CONSTRUCT SUCH HEADGATES.

III.

THE EVIDENCE DOES NOT ESTABLISH THAT THE DEFENDANT WAS COMMITTING A CONTINUING NUISANCE OR TRESPASS, AND THEREFORE PRESENTS NO CASE FOR AN INJUNCTION. THE REMEDY OF THE PLAINTIFF, IF ANY, WAS FOR DAMAGES IN AN ACTION ON THE CASE.

IV.

THE DEFENDANT WAS NOT DIVERTING OR THREATENING TO DIVERT WATER FROM THE COLORADO RIVER AT THE TIME OF THE COMMENCEMENT OF THE SUIT, AND THEREFORE NO INJUNCTION SHOULD HAVE BEEN ISSUED RESTRAINING THE DEFENDANT FROM DIVERTING THE WATERS OF SUCH RIVER.

V.

THE COURT WAS WITHOUT JURISDICTION TO DECREE AN INJUNCTION BECAUSE IT APPEARED FROM THE EVIDENCE THAT AT THE TIME OF THE COMMENCEMENT OF THE SUIT AN INJUNCTION TO SAVE COMPLAINANT'S PROPERTY FROM DESTRUCTION WOULD HAVE BEEN INEFFECTIVE AND FUTILE.

VI.

FROM THE ASSUMPTION THAT THE COMPLAINANT WAS NOT ENTITLED TO AN INJUNCTION TO PROTECT FROM DESTRUCTION ITS BUILDINGS, MACHINERY AND SALT BEDS, THE CONCLUSION INEVITABLY

Follows that It Was Not Entitled to Any Injunction at All.

VII.

The Injunction Was in Effect a Mandatory Injunction. A Court of Equity Rarely Decrees a Mandatory Injunction Requiring the Performance of Constructive in Contradistinction to Destructive Work and Will Never Decree a Mandatory Injunction When the Work Commanded to Be Done Requires in Its Execution Such Skill, Judgment and Technical Ability as Was Required to Close the Intakes Complained of.

VIII.

The Court Had No Jurisdiction to Decree an Injunction in This Suit in the Absence of a Determination at Law that the Acts of the Defendant Complained of Constituted a Nuisance.

IX.

There Is No Allegation or Proof that the Defendant When Able to Control the Waters of the Colorado River at Any Time So Used Them as to Permit Waste Water to Flow Upon the Lands of the Complainant. Therefore, Inasmuch as the Headgate Had Been Constructed and the Intakes Closed Prior to the Trial and Decree, Whatever May Have Been the Power of the Court to Retain Jurisdiction for the Purpose of Awarding Judgment for Damages, It Had No Power to Degree an Injunction and Thereby Restrain

THE DEFENDANT FROM PERFORMING ACTS WHICH IT HAD NEVER DONE OR THREATENED TO DO.

The sufficiency of the foregoing reasons will be considered *seriatim*.

I.

The Circuit Court for the Southern District of California had no jurisdiction to decree an injunction in effect abating a nuisance caused by the construction of intakes in the Republic of Mexico.

The allegation is:

"That defendant has constructed upon said Colo-"rado river three intakes for the purpose of diverting the "waters of said Colorado river into the canals above "mentioned and by means of said intakes and canal has, "for many months, been, and still is, diverting from said "Colorado river a stream of water, etc." [Par. V, p. 63, transcript.]

It will be observed that the *locus* of said intakes is not set forth in the bill. In its answer the defendant denies the allegation as set forth in the bill, and alleges,

"That the water referred to in complainant's bill "* * * was diverted from the Colorado river in Mex-"ico by that certain corporation, organized under the "laws of the Republic of Mexico," etc. [p. 105].

Intake No. 1 was constructed in December, 1902; intake No. 2 in June, 1904; and intake No. 3 was completed October 6th, 1904. The flooding of complainant's land did not commence until after the construction of intake No. 3.

Intake No. 1 was in California, and intakes Nos. 2

and 3 were in the Republic of Mexico. [Testimony of Duryea, p. 302; testimony of Sherman, p. 442.]

Duryea testifies that on the 15th of February, 1905, 450 second feet of water were running through intake No. 1; 896 through intake No. 2, and 1143 through intake No. 3 [p. 300]. He next visited the intakes in June, but does not testify as to whether, at such time, intake No. 1 had been closed or not.

The testimony of Sherman is to the same effect except that he made a third visit to the intakes in October or November, 1905, and that at such time No. 1 had been closed. [P. 461.]

Rockwood testifies:

"I found that the river began to rise very rapidly on "the 14th of March, and reached a height of 30.3 feet on "the 20th of March, and a height of 27.35 feet on the "17th of March." [P. 1245.]

He then testified as follows:

"Q. Did that March flood (referring to the flood with "respect to which he had testified as above quoted) have "any effect on the upper and the second intakes?

"A. *The upper intake, No. 1, had been closed at that "time.* It had no effect on intake No. 2 except tempo- "rarily. It did not scour it off permanently. As soon as "the water began to fall again it silted up." [P. 1247.]

This bill was filed in the Circuit Court on the 16th day of June, 1905.

It is thus conclusively established by the uncontradicted testimony, that while an unsubstantial amount of water was flowing through intake No. 1 on the 15th of February, 1905, such intake had been closed prior to

the 14th of March, 1905, more than two months before the filing of the bill in the Circuit Court.

At the time, therefore, of the filing of the bill, no water was being diverted from the Colorado river except through two intakes, designated as intakes Nos. 2 and 3, both of which were in the Republic of Mexico. Hence, at the time of the filing of such bill, admitting its every allegation to be true, and every contention of counsel for the appellee to be well founded, nevertheless, complainant was not entitled to an injunction unless it should be further ascertained that the Circuit Court of the United States, for the Southern District of California, had jurisdiction to compel the defendant to abate a nuisance caused by an obstruction, and the necessary result of an obstruction (paragraph 12 bill above quoted) created and existing in the Republic of Mexico.

It is well settled that a court of chancery has no such jurisdiction:

In the case of

Northern Indiana R. Co. v. Michigan Cent. R. Co., 56 U. S., 15 How., 14 L. Ed. 674,

it appeared that a railway company in Michigan, incorporated under the laws of that state, made an agreement with a railway company in, and incorporated by the laws of, Indiana, whereby the latter agreed that the former might build and operate a road in Indiana under the charter of the latter. Another railway company, also established by the law of Indiana, claimed the exclusive right to construct and operate a road in that part of Indiana, and it brought a suit in the Circuit Court of the United

States for the district of Michigan against the Michigan road, in which injunction was sought to restrain that company from constructing a road under the contract, in violation of the exclusive right claimed by the plaintiff. In disposing of the case the court said:

"In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the Circuit Court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court sitting within it. An action of ejectment cannot be maintained in the district of Michigan, for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted, where *the act complained of was not done* in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the *locus in quo.*" (56 U. S., at p. 242.)

It was insisted in that case that the court having jurisdiction of the persons could enforce its judgment by acting upon them; but, after indicating the class of cases in which the court could thus enforce its judgment, the court said:

"It will readily be admitted that no action at law could be sustained in the district of Michigan, on such

"ground, for injuries done in Indiana. No action of "ejectment or for trespass on real property could have "a more decided local character than the appropriate "remedy for the injuries complained of. And is this "character changed by a bill in chancery? By such a "procedure we acquire jurisdiction of the defendants; "but, the subject-matter being local, it cannot be reached "by a chancery jurisdiction exercised in the state of "Michigan." (At p. 244.)

The case of

Mississippi & Missouri Railroad Company v. Ward, 2 Black 485,

was an appeal from the District Court of the United States for the district of Iowa. Ward filed his bill in the District Court charging the railroad company with having created a nuisance by erecting a bridge across the Mississippi river at Rock Island, and prayed that the nuisance might be abated. It appeared that the boundary line between the states of Iowa and Illinois was the center of the Mississippi river; that one-half of the bridge was in Iowa and the other half in Illinois. The District Court rendered a decree in favor of the complainant and ordered that so much of the bridge as was in Iowa should be abated.

It was never contended that the court had jurisdiction to abate the nuisance so far as the same existed in Illinois. The U. S. Supreme Court reversed the decree of the District Court, and stated (p. 493):

"The United States District Court holden in Iowa "exercised the same jurisdiction that a state court of "Iowa could have exercised and no more. It had no

"power beyond the middle of the river. On that part of "the bridge within Iowa, and its piers, the court below "acted and ordered that the structure should be removed. "* * * The bridge is 1570 feet long and the number "of piers is six, three of them are on the Iowa side of "the river, the draw pier is fourth * * * the Illinois "draw passage is directly over the deepest channel of "the river and directly over the usual track of steam-"boats before the bridge was built. * * *

"An indictment could only have been prosecuted "against the owner for keeping up the nuisance in Illi-"nois in the courts of that state, because the nuisance "was a trespass and crime against the law of Illinois, "and the injuries to the complainant's boats giving him "the privilege to sue and abate the obstruction was as "local as the public right to indict. He asks nothing "from the person of the defendant, but seeks to remove a "local object because he has sustained special damage "from that object.

"The District Court had no power over the local ob-"ject inflicting the injury; nor any jurisdiction to inquire "of the facts, whether damage had been sustained, or "how much. These facts are beyond the court's juris-"diction and powers of inquiry, and outside of the case.

"The District Court ordered three spans of the bridge "and three of its piers to be removed, extending to mid-"dle of the river; and what would be the consequence if "we were to affirm that decree? It would, as a conse-"quence, render the bridge useless throughout, but it "would not materially remedy the nuisance complained "of. The navigation would certainly not be improved

"so far as the complainant is concerned by removing the "Iowa end of the bridge. The cross currents alleged to "exist would remain; the large eddy at the lower end of "the long pier, and the obstruction to the Iowa draw "passage by the eddy, would still remain." (P. 494.)

The fact that the lands injured by the alleged act of negligence, to-wit, the construction of intakes 2 and 3, are situated in California, does not give to the courts of California the required jurisdiction.

The principle is very learnedly discussed by the Supreme Court of Wisconsin in the case of

In re Eldred, 46 Wis. 530, reported in 1 N. W., p. 175.

In that case the court arrived at the conclusion that where a dam was maintained in one county which created a nuisance in another, an indictment for creating and maintaining such nuisance should be tried in the county where the dam was erected, that being the county where the offense was committed; and that an indictment in the county where the nuisance existed was improper.

On the authority of this case, and of the decisions of the Supreme Court of the United States above cited, the Supreme Court of Iowa rendered a decision upon facts in all respects parallel to those at issue upon this appeal.

In the case of

Gilbert v. Moline Water and Power Company, 19 Ia., p. 319,

it appeared that Gilbert was the owner of lands in the state of Iowa; that the Moline Water & Power Company had constructed a dam in the

Mississippi river, by reason whereof such lands of Gilbert in Iowa were flooded and injured. Gilbert brought suit in the Iowa court, and having obtained personal jurisdiction over the power company, asked for an injunction restraining the company from maintaining such dam. The dam was situated in the state of Illinois.

The Supreme Court of Iowa held that the courts of Iowa had no jurisdiction to compel the defendant to remove the dam.

This case was approved by the same court in the case of Buck v. Ellenbolt, 84 Ia. 394, 51 N. W., p. 22.

See also to the same effect the case of

Texas & P. R. R. Co. v. Gay, 86 Tx., p. 371; 25 L. R. A., p. 57.

The principle would appear to be that a court of equity can never compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court.

A defendant in California may be compelled by the courts of California to convey property in Great Britain; for the act which he is required to perform, to-wit, the execution and delivery of the conveyance, may be done in California, and the court may hold the defendant in custody until he complies with its order and executes the conveyance; but a court of equity will not undertake to compel the defendant to do something, the very doing of which requires that he be released from custody and go outside of the court's jurisdiction in order to perform such act.

The principle as thus stated is set forth in the case of

Munson v. Tryon, 6 Phila. 395,

as follows:

"It is argued, however, that even if there is jurisdic-"tion over the parties, there is none of the cause. I "am moved to enjoin against the commission of acts in "the nature of waste upon lands outside of the county "* * * my order or decree affects the defendants per-"sonally. It is only indirectly, and through the defend-"ants that it affects the lands. It has often been decided "that when a chancellor obtains jurisdiction over a party "he may make a decree that affects lands even in a for-"eign country. It is true, too, that to justify a court in "interfering and exercising a jurisdiction in cases relat-"ing to lands where the court cannot send its process, the "relief sought must be such as the court is capable of "administering in the case before it. For this reason it "was ruled by Judge King in the Court of Common Pleas "of Philadelphia that the court had no jurisdiction of a "bill complaining that defendant had set up and main-"tained a nuisance, affecting plaintiff's lands, in Mont-"gomery county. The reason assigned for this ruling "was, that no obedience of the defendant or act of his "could execute the necessary decree. The wrong done "was the creation of a nuisance. The only remedy was "abatement, and the Common Pleas could not send pro-"cess to abate the nuisance. * * * Jurisdiction is en-"tertained in equity over extra territorial torts when the "court has full power to execute its decree where the "appropriate decree operates on the future conduct of

"the defendant and not directly upon the property "threatened to be injured. When a nuisance has been set "up and abatement decreed, in order to carry the decree "into effect, a writ of assistance or other similar process "may be necessary. Such a writ cannot be sent into a "foreign jurisdiction, and therefore, in such a case, be- "cause a court of equity cannot complete its work, it will "not commence."

The distinction is well stated in the very carefully considered case of

Poindexter v. Burwell, 82 Virginia 507, at p. 513.

There it was held that the doctrine is that if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority operating territorially within the foreign jurisdiction, the court may act in *personam,* and oblige the party to convey, or otherwise to comply with its decree. But it is not competent to the court to decree touching a foreign subject when the act to be done can be accomplished and perfected only by an authority operating territorially.

See also,

Pomeroy on Equity Jurisprudence, Sec. 1318.

The force of this position is not affected by the fact that the suit was commenced in the Superior Court of California on the 8th day of March, 1905, six days before the 14th of March, when the March floods occurred, prior to which floods intake No. 1 had been closed.

It is believed that the right of the complainant to an injunction will be determined as of the date when by

filing its bill on the equity side of the court it elected to rely upon its right to equitable relief rather than to prosecute its action at law for damages.

But if it be held that its rights are to be determined as of the date when it commenced its action in the Superior Court even then it had no rights founded upon intake No 1.

It is true that there is no direct testimony as to whether intake No. 1 was open or closed on said date.

It is obvious, however, from the entire record, that the by-pass around the headgate on American soil, which by-pass has been designated intake No. 1, was in no sense the cause of any injury to complainant. It had been open since December, 1902, and had never caused any injury to any property, and it had always been closed without difficulty before the spring floods.

All the evidence shows that the trouble, if occasioned by any act of the defendant, was occasioned by the construction of the third intake. The third intake "gave the water a higher and steeper course toward the valley." [P. 2090.]

"In June, 1904, Rockwood stated to Mr. Heber that "he believed they would have to take the chance and cut "a third intake from the river to the canal * * * "stating that as the fall of the canal was so much more "rapid than the fall of the river he believed there would "be no trouble in keeping the intake open." [Statement of Meserve to secretary of state offered in evidence by counsel for complainant, transcript, page 2154.]

All the records and photographs produced by plaintiff

show that the alarming conditions were at or about intake No. 3.

Therefore, even if it had been affirmatively established that intake No. 1 was open at the commencement of the action in the Superior Court and had remained open, nevertheless an injunction should not have been decreed because there was no evidence that the diversion at this point endangered complainant's property.

It is submitted, moreover, that the presumption raised by Duryea's testimony to the effect that on the 15th of February, 450 seconds of water were flowing through intake No. 1, is at least met by Rockwood's testimony above quoted, which is uncontradicted, that intake No. 1 had been closed before the March flood. The March flood, as has been stated, commenced on the 14th of March. Rockwood commenced work immediately after the February floods receded, and it would be unreasonable to infer from the facts, that the closing of intake No. 1 had not been consummated prior to the 8th day of March.

The complainant made no effort to establish that such intake was open at the time of the commencement of the action in the Superior Court.

The injunction should not be granted unless complainant establishes the facts upon which it must depend by clear and indisputable testimony. This is a well recognized principle of law, and is fortified by many decisions cited in appellant's opening brief.

The burden was upon the complainant to prove that its property was imperiled by reason of intake No. 1 at the time of the commencement of the action. It can-

not be claimed with any sincerity or candor that this fact has been proven.

Furthermore, immediately after the February floods receded, which, according to Duryea's testimony was about February 15th, Rockwood instructed Sexsmith to close the intakes.

Sexsmith testified with respect to intake No. 1:

"It was an easy thing to close it." [P. 916.]

Therefore there can be no presumption from the fact that it was open on February 15th that it remained open until the 8th of March. In the absence of any testimony whatever on the subject, proof that it had been open on the 15th of February might raise the presumption that such condition continued, and thus shift the burden; but such presumption, if any, is neutralized by the proof that it had been closed prior to the 14th of March, especially when such proof is considered in connection with the uncontradicted testimony that it was Rockwood's purpose and plan to close it, and that he commenced to do so immediately after the February floods receded.

Furthermore, there is no allegation or proof that the California Development Company was at the time of the commencement of the action maintaining said intake No 1. The proof that it had been closed within at most, six days after the commencement of the suit, and remained closed until October, 1905, as testified to by Sherman, and has remained closed ever since, so far as the record discloses, is conclusive that at the time of the commencement of the suit the California Development Company must at least have been engaged in a compe-

tent effort to close it, and that therefore the intervention of a court of equity was uncalled for, and would have been improper.

If the foregoing reasoning with respect to intake No. 1 should not be satisfactory to the court, then attention is called to the quotation from the decision of the Supreme Court of the United States in the case of Missouri & P. R. R. Co. v. Ward, *supra,* wherein that court reversed the decree of the Circuit Court, directing the pulling down of such of the piers of the bridge as were within the territorial jurisdiction of the court, basing such reversal upon the ground that the pulling down of such piers would not put an end to the nuisance complained of, and while injurious to the defendant would not materially benefit the complainant.

Conceding that at the time of the commencement of the suit intake No. 1, such as it was, was still open; even then it would have been error for a court of equity under the principle laid down by the Supreme Court of the United States to direct the closing of that intake when it was without jurisdiction to reach the substantial cause of the nuisance, to-wit, the intake in the Republic of Mexico.

Without respect to the evidence the bill was fatally defective in that the locus of the intakes was not alleged. It was incumbent upon complainant to show to a court of equity by the averments of its bill, both that the court ought, and had the power, to grant its prayer. The mere allegation that the defendant had in some unspecified place, created a nuisance, is not sufficient to invoke the equitable power of the court. In as much as

a court of equity is without authority to abate a nuisance beyond its jurisdiction, the complainant should have alleged that the place of the nuisance was within the jurisdiction of the court.

Encyclopœdia of Pl. and Pr., Vol. 22, p. 780;
McKenna v. Fisk, 1 How. 241;
Bank v. Lane, 80 Maine 165.

"It is just as necessary and for the same reason to "aver the fact requisite to show that the court has jur- "isdiction of the plaintiff's suit as to allege sufficient to "demonstrate that there is not adequate remedy at law "and that there is redress in equity. The judgment of "a city court in an action in which cause of action is not "averred to have arisen within the city, is erroneous, "because the case is not brought within its jurisdiction."

Maples v. Wightman, 4 Conn. 376;
Griswold v. Mather, 5 Conn. 435;
Winford v. Powell, 2 Lord Raymond 1310.

Especially is this true of federal courts.

"The rule is inflexible and without exception, that the "facts upon which the jurisdiction of the courts of the "United States rests, must affirmatively appear in the "record of all suits prosecuted before them; and the jur- "isdictional facts must affirmatively appear at the com- "mencement of a suit, by a statement of them in the "declaration or bill of the party suing."

Bates on Federal Procedure, Sec. 125, p. 144.

"Hence when a plaintiff sues in a court of the United "States, it is necessary that he should show in his plead-

"ing that the suit he brings is within the jurisdiction of "the court and that he is entitled to sue there. And if "he omits to do this and should by any oversight of the "circuit court obtain a judgment in his favor, the judg- "ment would be reversed in the appellate court for want "of jurisdiction in the court below."

Dredd Scott v. Sanford, 19 How. 393, at pp. 401-402.

See also,

Ex-Parte Smith, 94 U. S. 455 at p. 456;
Bors v. Preston, 111 U. S. 252 at p. 255;
Hanford v. Davies, 165 U. S. 273, at p. 279;
Metcalf v. Watertown, 128 U. S. 586, at pp. 588-9.

The jurisdictional question here raised cannot be waived.

In the case of United States v. Crawford, 47 Fed. 561, the court, at page 566, says:

"The counsel for defendants filed no pleading setting "up the want of jurisdiction because of the failure of sub- "ject matter, but in argument they suggest there is a "failure of subject matter. This they may do, and the "court may act on this suggestion and dismiss the case. "* * *" It is the court's duty *sua sponte* to so act.

See also,

Yellow Aster Co. v. Crane Co., 150 Fed. 580.

II.

The Circuit Court had no jurisdiction to compel the defendant to construct headgates in the Republic of Mexico; for the reason that the defendant would not have been permitted by the laws of the Republic of Mexico to construct such headgates.

Counsel for appellee, at pages 66 and 67 of their brief, quote from Mr. Meserve's statement to the secretary of state, as follows:

"By the terms of the concession from the Mexican "government to the Mexican company it was provided "that no intake connecting with the Colorado river "should be constructed in Mexico until the plans of all "proposed structures were first approved by the proper "engineering authorites of Mexico."

It appears that the Mexican government granted the Mexican corporation, whose stock was owned by the defendant, certain concessions, which gave such company the right to divert water in Mexico from the Colorado river [p. 194]; that the company, however, had no authority to build headgates until the plans of the same had been approved by the Mexican government.

Rockwood, the engineer of the defendant, testifies that he had prepared plans for such headgates in the month of November, 1904, and that such plans had been sent to the City of Mexico for approval [pp. 1346-7]; but that they were not approved until December, 1905.

Schuyler testifies:

"The material was ordered for these gates at once, "and would have been put in—the gates would have "been put in in the fall of 1904, had permission been

"granted or the privilege been obtained from the Mexi-
"can government." [Pp. 1311-12.]

"Q. And as consulting engineer for the company,
"there is no reason that now suggests itself to your mind
"why that gate was not constructed within ten weeks
"from the time when the river bank was cut so as to al-
"low to flow into the canal?

"A. The only reason that I know is the fact that the
"Mexican government had not approved the plans for the
"gate.

"Q. Then, not knowing whether they were going to
"be permitted to put a gate in there at all, and knowing
"that high water would come at some time, they never-
"theless cut the canal? Is that your understanding of it?

"A. I don't know about their knowledge as to what
"the government of Mexico might do in the matter of the
"approval of the plans, but they were friendly with the
"government and had received concessions from them
"and had every reason to expect that the approval of the
"plans would be immediate upon their filing." [Pp.
1316-1317.]

It is well settled that no court of equity in the exercise of jurisdiction over the person of a defendant will compel him by imprisonment or like coercion to convey property, when by the laws of the country where the property is, no right to such conveyance existed.

Texas & Pac. R. R. Co. v. Gay, 25 L. R. A., at top p. 50.

This principle has been well established in numerous cases and is based upon sound logic. The decree of a court of equity in California compelling a conveyance of

property in Mexico or New York cannot of itself affect the title to such property.

Watkins v. Holman, 16 Peters, at p. 57.

The California court can only compel the execution and delivery of the conveyance. The grantee may make such use of such conveyance in Mexico or New York as will pass to him the title to the property conveyed. If, however, under the laws of Mexico or New York, such conveyance would be invalid, and this should be established as a fact to the satisfaction of the California court, then the California court would not decree such conveyance, because such decree would be useless and futile.

Inasmuch, therefore, as under the evidence the defendant at the time suit was commenced was not authorized by the laws of Mexico to construct the headgates which the *complainant has alleged were the only means of stopping the destruction of its property* [bill, paragraph XII, p. 67], the court was without jurisdiction to compel it to do so.

In other words, at the time of the commencement of the suit, the defendant was not unconscientiously refusing to construct the required headgate. It had no authority at law to construct it. Grant that the cutting of the intakes in June and October under such circumstances was even criminal negligence, as charged by counsel for the appellee, nevertheless such act of criminal negligence had been done, and the defendant, while liable to the complainant in damages therefor, was, under the laws of Mexico, powerless despite the best of intentions, to construct such headgates, and save com-

plainant's property from destruction. Such destruction was complete in October, 1905, two months before the Mexican government granted the permission applied for.

Under such circumstances, at the time of the filing of the bill, complainant was not entitled to equitable relief, and had no remedy except its action at law for damages.

Even the general rule that equity will by acting in *personam*, compel the specific performance of a contract, is subject to the recognized exception, that where the contract involves work or skill to be done on foreign soil, according to foreign law, as would the construction of the headgates in question, equity has no jurisdiction.

Port Royal R. R. Co. v. Hammond, 58 Ga. 503;

III.

The evidence does not establish that the defendant was committing a continuing nuisance or trespass, and therefore presents no case for an injunction. The remedy of the plaintiff, if any, was for damages in an action on the case.

There is but little, or no conflict as to any of the material facts and occurrences subsequent to the diversion of the waters of the Colorado river by the California Development Company. What conflict there is consists chiefly in the differing opinions of experts as to what the Colorado river would have done under certain circumstances.

There is no allegation in the bill, nor was any evidence adduced, to the effect that the California Development Company at any time assumed the right to divert waters of the Colorado river without regard to the ef-

fect of such diversion upon the property of the complainant. Nor does counsel charge that the California Development Company ever assumed to claim, or to undertake the exercise of, such a right.

The tendency of complainant's evidence and the charge of counsel are that the California Development Company, prompted by the desire to furnish large quantities of water to the people in the valley quickly and without expense, constructed these intakes recklessly and without such prudence and skill as was required of it by law.

The California Development Company cut an intake 60 feet wide for the purpose of diverting water.

It is not claimed that a 60-foot wide cut would convey sufficient water to occasion waste enough to damage complainant's property.

It is conceded that the California Development Company did not intend that such intake should be widened; that its purpose was not to widen and enlarge it; that its intent was (in the event that a headgate could not be constructed before the summer floods) to close up this intake entirely, and that its reasonable expectation, based upon past experience, was that it would be able to fill it up with little difficulty before the floods.

As a matter of fact, however, the huge floods of the Colorado river swept through this intake *and enlarged it*.

The enlargement was the act of the Colorado river, and not the act of the California Development Company

It is not contended here, and now, while pursuing this line of thought, that the construction of the 60-foot wide

intake was not the proximate cause of the enlargement, but it is merely insisted that, as a matter of fact, the California Development Company did not construct the enlarged intake.

The flooding of complainant's land was due to the enlarged intake. But for the fact of this enlargement, such flooding and the destruction of the complainant's property would not have taken place.

The enlargement did not exist in consequence of the desire or will of the California Development Company; it was in no sense maintained by the California Development Company. The California Development Company did not claim or contend that it had the right that this enlarged intake should continue. On the contrary, it existed against its wish and the California Development Company, by the use of all its resources, was endeavoring, prior to and at the time of the filing of the bill, to close it up. Wherefore, then, necessity or occasion for the intervention of a court of equity?

Concede for the purpose of argument that such enlargement and the consequent destruction of complainant's property was caused by the act of the California Development Company, and this is all that counsel for the complainant claim. There follows, as has been said, liability on the part of the California Development Company in an action for damages, but no ground or excuse for action by a court of equity.

The basis of an injunction, whether prohibitory or mandatory, is the intent of a party to keep on doing something which injures another.

One erects a dam and claims the right to have the

dam remain where constructed. The consequence of the construction of such dam is the flooding of plaintiff's property, and so long as such dam remains there, such flooding will continue. The complainant asks the court of equity to force the party who constructed *and maintains* the dam, to remove it.

It is the maintenance of the dam which gives the court of equity jurisdiction. Each day and minute that such dam remains and is maintained by the defendant, it is a menace to the complainant's property, and each flood by reason thereof, a nuisance; and in all cases where a court of equity has ordered such dam to be removed, the gravamen of the action has been the settlement of the conflicting rights of the respective parties. In all such cases the defendant has claimed that he had the right that the dam should remain there, and even though not performing physical acts of maintenance, was by his attitude and contention with respect to it morally keeping it there. The principle has been well stated in the following language:

"The fundamental province of the injunction is to "prevent a MEDITATED wrong, and not to redress an in- "jury."

Palmer v. Foley, 45 How. Pr. 110 at p. 118.

In this case the defendant was meditating nothing, was maintaining nothing, and was asserting no right. Grant that it had committed a wrong.

Suppose for purposes of illustration that a party had negligently thrown a lighted cigar into combustible material; that the same had taken fire, and that complainant's property was either destroyed or in process of de-

struction. The complainant, of course, would have his action at law for damages. But will it be seriously argued that a court of equity would undertake to compel the man who threw the cigar either to put out the fire or to rebuild complainant's house?

If the allegation and proof in such case had been that the defendant threatened to throw a lighted cigar into such combustible material frequently and at will, then a case for injunction might have been made out, and the decree would have been grounded not on the throwing of the cigar which had been thrown or on the fact of the fire which was raging, but upon the allegation and proof that the defendant, unless restrained, would throw more cigars and cause additional fires.

If in this case the complainant had alleged and proven that the defendant intended or threatened to construct other and further intakes of a dangerous character, then it would have been proper for a court of equity to restrain the defendant from constructing any further intakes unless the same were protected by suitable headgates.

But there is no such allegation or proof or charge by complainant's counsel.

NO CONTINUING ACTS OF TRESPASS WERE PROVEN AND NO THREATS TO CONTINUE ANY ACTS OF TRESPASS WERE EITHER ALLEGED OR PROVEN.

Three acts, to wit, the construction of the three intakes, not acts of trespass, but acts, which, under certain conditions might cause injury to complainant's property were alleged, and, if you please, proven.

Counsel for appellee, in his brief, at page 78, quotes from Hawgood's testimony:

" 'But if I had succeeded in doing it before, I would " 'have attempted to do it again. If I had been success- " 'ful I would be tempted to take chances on it.' "

And then counsel adds:

"Will anyone claim that yielding to *temptation* to "take *chances* in a work of this nature is good engineer- "ing? When an engineer takes chances in a business "of this nature he throws discretion and judgment to the "winds. It is true Rockwood said he took the chance "because he had done it successfully once. But that is "not sufficient reason why he should have shown such "hardihood a second time."

The cut of Intake No. 3 prior to the filing of the bill had been demonstrated to the satisfaction of Rockwood and everybody else not only to have been unsuccessful, but to have imperiled both complainants, and defendant's entire property and system.

As has been argued, Intake No. 1 had been closed successfully prior to the filing of the bill, and Intake No. 2, had been filled with silt by the March floods, and was of no serious import.

The conditions therefore which confronted the parties at the time of the filing of the bill were, that as the result of one, and possibly two, or even three acts of the defendant,—the consequence of which acts the defendant was at such time earnestly laboring to avert,—the property of the complainant was being destroyed. This was no ground for the interposition of a court of equity. A single allegation that the defendant, despite

this sad experience, would have again "taken its chances" and constructed other intakes, fortified by evidence sustaining such allegation, might have afforded counsel for appellee ground to argue that the facts of this case were such as to give a court of equity jurisdiction; but the absence of such allegation and evidence, not to speak of the overwhelming negation of it to be adduced from the entire trend of the testimony and acts of all the parties, precludes any suggestion that the complainant had any remedy except its action at law for damages.

IV.

The defendant was not diverting or threatening to divert water from the Colorado river at the time of the commencement of the suit, and therefore no injunction should have been issued restraining the defendant from diverting the waters of such river.

This point has been virtually covered by the argument just preceding.

The allegation in the bill that the defendant had constructed upon the Colorado river three intakes for the purpose of diverting the waters of the Colorado river into its canal, while sufficient in connection with the evidence as viewed by the district judge, to establish a basis for a money judgment, is of itself insufficient as a foundation for injunctive relief. And complainant's right to an injunction must depend upon its ability to prove the allegation of the bill that the defendant, at the time of the commencement of the suit, *was diverting* water from the Colorado river in such fashion as to work irreparable injury to the complainant.

In its answer, defendant denies the allegation that the defendant at such time was diverting waters from the Colorado river.

There is no evidence that at such time defendant, or anybody else, was diverting any waters whatever from the Colorado river.

The defendant had prior to October, 1904, done one, or perhaps three acts, which, if complainant's contention upon the merits be allowed, were the proximate cause of the flowing of the Colorado river on to complainant's lands.

The defendant committed no act of diversion of water after the 6th of October, 1904, and, as a matter of fact, prior to the commencement of the suit, had been engaged, at great expense in desperate efforts not only to control, but to *totally check* its diversion.

A court of equity, according to the old rule, operates by action upon the conscience of the individual. What unconscientious act was the California Development Company doing at the time of the commencement of the suit?

Granted that prior thereto it had been a sinner. Its acts were surely those of repentance, and its contrition and resolution to amend cannot be questioned. The conditions called for penance, but it was too late for prevention.

Complainant's remedy was an action at law.

In order to distinguish the connection of the California Development Company with the continuance of the flooding of complainant's lands from such acts of maintenance as are necessary to

establish the allegation in the bill that the defendant *"was diverting"* waters, let us, for purposes of illustration, assume that in February, 1905, the California Development Company had conveyed its properties and canals to a third party, and that such third party upon such conveyance in February, 1905, did each and every thing which the evidence shows that the California Development Company did subsequent to such date.

Complainant's remedy against the California Development Company for damages for the injury occasioned by the acts of the California Development Company prior to the conveyance, would have remained, and complainant would have had no action for such damages against the grantee; but complainant's right to an injunction being based as it necessarily must be based, upon allegations of what the defendant was doing at the time of the commencement of the suit, to wit, the 8th of March, 1905, would have been precisely the same against such grantee as against the California Development Company, and if not entitled to an injunction against said grantee, complainant could not be entitled to an injunction against the California Development Company.

If A construct a dam by reason whereof B's premises are flooded, and A then conveys his property and the dam to C, and the conditions are such that B is entitled to have the nuisance abated, he could maintain his suit against C to have the obstruction removed.

If A owns property and B erects a building under

such circumstances as wrongfully to interfere with A's air and light, and then conveys the building to C with notice, A would have the same right to have the building removed against C as he would have had against B.

If the nuisance be of that continuing character which is essential in order that a court of equity may by injunction abate it, then all those who succeed to the ownership of the obstruction which creates the nuisance are, in the absence of laches, subject to the operation of even a mandatory injunction.

It certainly will not be asserted that this complainant would have been entitled to any injunctive relief on the 8th of March, 1905, or at any time, against such supposed grantee. Such grantee's defense would have been simple and conclusive. The evidence contained in this record would have been established beyond peradventure, his denial that he was diverting water, and the bill would have been dismissed.

The distinction then between the acts of the California Development Company subsequent to February, 1905, and the acts of the man who maintained the dam which his predecessor in interest constructed, rests entirely in this: the California Development Company was when this suit was commenced in no sense maintaining the intake, while in the other case the grantee was maintaining the dam.

If in the suit against the grantee of him who had constructed the dam it had been proven that such grantee had never claimed the right to have the dam there, and had himself made many efforts to pull it down, and still wanted it pulled down, such proof would have been a

defense to the action, because the same distinction would then exist, and the evidence of maintenance, that is to say, of continuing acts of trespass, would be lacking.

V.

The court was without jurisdiction to decree an injunction because it appeared from the evidence that at the time of the commencement of the suit an injunction to save complainant's property from destruction would have been ineffective and futile.

Let it be conceded for the purpose of argument, that if at the commencement of the suit, the complainant was entitled to relief by injunction, the court had the right upon the trial, to award it any relief to which it was found to be entitled, even though by reason of occurrences after the commencement of the suit, the complainant's right to an injunction should have ceased before the trial and decree; and, let it be further conceded that if the complainant were entitled at the time of the commencement of the suit to the equitable relief asked for, the court had jurisdiction to award it a money judgment for damages. Nevertheless, we believe it to be settled law that in order to entitle the complainant to any relief in this suit, it is not sufficient that the bill alleged facts sufficient to entitle it to an injunction, but it was necessary for it to establish upon the trial that at the time of the commencement of the suit it was entitled to equitable relief.

In support of this we will re-quote from the decision of the United States Supreme Court a quotation set forth in appellant's opening brief, as follows:

"The rule is that where a cause of action cognizable

"at law is entertained in equity, on the ground of some "equitable relief sought by the bill which it turns out can- "not for defect of proof or other reason be granted, the "court is without jurisdiction to proceed further and "should dismiss the bill and remit the cause to a court "of law."

Dowell v. Mitchell, 105 U. S. 430.

See also cases cited in appellant's opening brief, page 158.

The fact that the bill contains allegations showing the complainant to be entitled to equitable relief, is not sufficient. While sufficient, of course, upon demurrer, the bill will be dismissed upon trial, if such allegations showing equitable jurisdiction are not established by the evidence.

Again we quote from an opinion quoted in appellant's opening brief:

"A moment's reflection will satisfy everyone that "nothing could be more mischievous than the adoption of "the principle contended for by the complainant. In such "case it would only be necessary for the defendant in an "action at law to make some pretense of claim against "the plaintiff in such action of fraud, mistake, accident "or right to an account, in order to change the forum "of litigation, and to compel the determination of ques- "tions purely legal in a court of equity."

Collier v. Collier, 33 Atl. 193, at p. 194.

It is alleged in the bill that the complainant is engaged in the mining and manufacture of salt; that it owns certain sections of land upon which are an extensive salt crust, and certain buildings and machinery used for the

mining and manufacture thereof. That owing to the diversion of the waters of the Colorado river by the defendant, the salt, buildings and machinery have been to some extent injured, but have been protected by dykes erected by complainant. That if the diversion of waters is stopped, the waters then encroaching upon such dykes will, by reason of climatic conditions, evaporate and disappear. That the amount of water in the Salton lake is constantly increasing, and "if such increase be not checked, will in *a short time* overflow said dyke." [Paragraph 8, p. 65.]

In conclusion complainant alleges that defendant will "unless restrained * * * continue to divert from the Colorado river large quantities of water * * * and thereby destroy the property and business of complainant, and occasion complainant great and irreparable injury."

It appears by the articles of incorporation of the complainant [p. 2077] "that the purposes for which it is formed are for mining, manufacturing, buying and selling salt and other minerals, and also purchasing and selling real estate."

The object of the suit is by injunction to protect from injury and destruction the buildings, machinery and salt beds necessary for the carrying on of the purposes of complainant's organization.

It is asserted on behalf of defendant that the evidence showed that the suit was commenced too late to save such property from destruction.

The evidence on this point is summarized in appellee's brief at pages 94 and 95. Upon the evidence so

summarized, counsel for appellee comment, at page 95, as follows:

"It appears from this testimony, which, as we have "said, is not contradicted, that by the 26th of March, "1905,—up to which date there had been no exceedingly "high water in the Colorado; at any rate, if high water "had prevailed it did not last for a protracted period— "the property of complainant was practically destroyed. "The record will be searched in vain for any explanation "of the cause of this great damage and injury to com- "plainant other than the reckless method pursued by de- "fendant in the conduct of its operations."

Drury, witness for complainant, also testified that the complainant abandoned all effort to save its property on March 10th, 1905. That on that date "the whole thing was swamped." [Tr., p. 602.]

The March floods, which, as above stated, commenced on the 14th of March, and during which the river attained a height of over thirty feet, rendered it physically impossible for the California Development Company or anyone, to close the intake prior to the 26th of March, the day fixed by counsel in their brief as the date when the property of the complainant was practically destroyed.

The defendant was, as a matter of fact, engaged in an effort to close the intake prior to such March floods, and immediately after the February floods; and an injunction could not have compelled it to do more than it was doing. Even if it should be argued that the defendant prior to such March floods was not proceeding to close the intake with proper dispatch and skill,

nevertheless, it remains true that no injunction issued on the 8th of March (assuming that the Superior Court had issued one *ex parte* upon the filing of the complaint in that court) could have, as a matter of fact availed, so that in pursuance of it other and more successful and expeditious plans for the closing of the intake could have been devised and put into execution prior to the flood commencing on the 14th of March, which, according to the undisputed testimony, would have undone all that might have been done prior thereto.

It is therefore an indisputably established fact, virtually conceded by appellee's brief, that at the time the suit was commenced even in the Superior Court of California, the destruction of complainant's property described in the bill, was inevitable.

The fact that it had not been totally destroyed on the 8th of March is immaterial, if on that date the conditions were such that its destruction was in the course of nature inevitable, despite any reasonable efforts of human agency to save it.

One may be enjoined under certain circumstances from burning material upon his own premises in such manner as to occasion the conflagration to spread and destroy the improvements upon the adjacent property of another, and if one threatens to burn material upon his own premises in such way, the owner of the adjacent property may, upon proof of such threats, enjoin him from so doing. But, if the first party has before suit brought, actually started the fire upon his own property, and as a result of it the conflagration has as-

sumed such proportions that it must inevitably extend to and consume the improvements upon the adjacent owner's property, a court of equity would not, at the instance of such owner of the adjacent property, issue an injunction of any kind, even though at the time of the request for the injunction the fire had not actually reached the property of such adjacent owner.

The point suggested is, that though the building, machinery and salt beds were not on the 8th of March totally destroyed, and were not in fact destroyed until the 26th of March, still, on the 8th of March the Colorado river was so far beyond control that no human agency could have arrested its floods in time to save complainant's property from annihilation.

Therefore, it is submitted as a proposition of fact established by the evidence, that the destruction of complainant's property had been virtually effected prior to the commencement of the suit and that no injunction could then lie for the purpose of saving such property, because any such injunction would have been as futile as King Canute's command to the tides of the ocean.

At the time the action was commenced, and prior thereto, the California Development Company found itself engaged in a life and death conflict with the Colorado river. It may be that the California Development Company by its recklessness in October, 1904, had, so to speak, breathed life into a Frankenstein, and brought this engine for destruction into existence; but the fact, nevertheless, was that this mighty force, however created, was at such time militant and overwhelming, and

the defendant was impotent to arrest it in its course of destruction.

Rockwood testified, referring to the conditions in the spring and summer of 1905:

"The more money we would have spent, the more "money would have been thrown away. I do not believe "that the expenditure of any amount of money at that "time could possibly have done any good." [P. 1260.]

The President of the United States, in his message to Congress upon the subject, which was put in evidence by counsel for complainant, summarizes the conditions as follows:

"There appears to be only one agency equal to the "task of controlling the river; namely, the Southern Pa- "cific Company, with its transportation facilities, its "equipment * * the need of railroad facilities and equip- "ment and the international complications are such that "the officers of the United States, even with unlimited "funds could not carry on the work with the celerity re- "quired. It is only the fact that the officers of the South- "ern Pacific Company acting also as officers of the Cali- "fornia Development Company, have been able to apply "all its resources for transportation, motive power and "the operation of the road that has made it possible to "control the situation to the extent which they have al- "ready done." [Tr., p. 2095.]

In its effort to close the intake the California Development Company having without avail, exhausted its own resources, turned over (as appears by the contract with the Southern Pacific Company in evidence, p. . . .) the entire control of its organization and its properties

to this great railroad system. It evinced by such contract its willingness to surrender its all; and withal the forces of the Colorado river remained unchained until January, 1907.

How futile then would have been a decree of the court compelling acts for the purpose of saving this doomed property. Such futility was, as a matter of fact, demonstrated before the trial by the total destruction of complainant's property in spite of the temporary injunction which was issued shortly after the filing of the bill.

(The temporary injunction is not printed, but it is referred to in the testimony, and, as a matter of fact, a copy of it has been certified and made a part of the record recently, and since the printing of the transcript.)

The principle contended for is stated by the Supreme Court of California as follows:

"If the destruction of the ditch be inevitable, as Clark "seems to think, irrespective of future work, we are un- "able to perceive how, by preventing the work, the ditch "can be saved from destruction. If the destruction must "come 'any way', we are unable to perceive how even a "court of equity can prevent it. Assuming then, that an "injunction would have been allowed, if it had been ap- "plied for at the time the work of defendants first threat- "ened injury to the ditch, we think it clear that the plain- "tiffs have delayed their application until it is too late. "So far as we can judge, an injunction would be ruinous "to the defendants, and of no benefit to the plaintiffs."

Clark v. Willett, 35 Cal., p. 534, at p. 548.

VI.

From the assumption that the complainant was not entitled to an injunction to protect from destruction its buildings, machinery and salt beds, the conclusion inevitably follows that it was not entitled to any injunction at all.

It is true as suggested by Judge Wellborn in his conclusions, that in addition to these buildings, machinery and salt beds, complainant owned its barren freehold; and it is admitted that under certain circumstances the owner of a barren freehold, without respect to its value, is entitled to injunctive relief. But it is confidently asserted that, in this suit, and upon the facts of this record, complainant was not entitled to injunctive relief for any such purpose.

While complainant does allege in his bill ownership of the soil, the entire theory of the bill is the apprehended destruction of the buildings, machinery and salt beds; and it is submitted that the complainant is bound in this action by such theory, and that therefore if the court should view favorably the contention of the defendant in the preceding point, the bill should be dismissed.

The purposes of the organization of the complainant are stated in its articles of incorporation as above quoted. The machinery and salt beds having been destroyed, the barren freehold could not longer be of use for the purpose of mining, manufacturing, buying and selling salt and other minerals.

It is true that complainant also had power by its charter to buy and sell real estate, although such fact is not set forth in the bill.

The entire evidence establishes the fact that the real estate in question had no value other than its salt beds, which, as has been argued, were at the time of the commencement of the action, doomed to inevitable destruction. Therefore, they had no value for purposes of sale. It follows that the complainant could not under its charter, use them for any purpose whatever.

All the earlier authorities, and many modern ones, hold that the allegation of ownership of property is not of itself sufficient to give a complainant equitable relief; that he must in addition set forth some facts tending to show that his remedy at law is not adequate, or that his damage is irreparable.

Admit, however, that the weight of modern authority is against this proposition, and that most jurisdictions, influenced chiefly by the disposition of the states, by statute, to disregard the distinctions between legal and equitable procedure, have held that a permanent injury to the freehold is *per se* a nuisance, and entitles its owner to injunctive relief. Still, it is asserted with confidence that no case can be found in the books where a court of equity has been induced to exercise this extraordinary power at the instance of a party who is in no way damaged by the alleged nuisance, unless the party committing the nuisance is doing so and threatening to continue to do so deliberately, wantonly or maliciously, unless, in fact, the nuisance is what some courts term a "pragmatic nuisance".

Especially is this true if the injunction sought is a mandatory injunction. The proposition that the injunction prayed for was in effect a mandatory injunc-

tion, and that the complainant was not, under the evidence, at the time entitled to a mandatory injunction, will be discussed presently, but in this connection, and proceeding upon the assumption as stated at the heading of this paragraph, that the complainant came to court too late to save its buildings, machinery and salt beds from destruction, the court is respectfully asked to strip from the bill all of its allegations with respect to buildings, machinery and salt beds,—as must be done if such assumption is well founded—and to consider whether any chancellor before whom the conditions as set forth in the evidence were faithfully presented, would decree the injunction here prayed for, at the instance of a complainant, whose prayer was this:

"I own some worthless land on the desert, of no use for any purpose or character whatever; and the California Development Company, not maliciously or wantonly, but imprudently and taking its chances, but inspired by the desire to serve quickly the needs—not the comfort, but the needs—of thousands of people, cut intakes into the Colorado river and as a result thereof, the channel of such river has been turned and the waters are flowing upon my worthless lands; but they are mine and while I am not using them and cannot use them, and they are not being damaged by this innudation, still they are mine and I demand that this court of equity do say to the California Development Company 'it is unconscientious that this condition be continued; and it is decreed that you, under penalty of imprisonment and punishment, expend hundreds of thousands or millions of dollars and close that intake."

Would any chancellor, ancient or modern, give such prayer consideration? Still, such is complainant's position in this suit, if it be a fact, as admitted by counsel for appellee in their brief, that at the time of the commencement of the suit complainant's machinery, buildings and salt beds were, as has been stated, doomed to inevitable destruction.

The principle that an injunction, and especially a mandatory injunction will not be granted when the damage to the party sought to be enjoined is heavy and the damage to the plaintiff relatively unimportant except in cases of pragmatic trespass, has been recognized by all courts.

McCarthy v. Bunker Hill & Sullivan Co., 147 Fed. 981;

High on Injunctions, Sec. 2, note;

In Murdock's Case, 2 Bland's Chancery, 461; 20 Am. Dec. 381.

In the case of Morris & Essex v. Prudden, 20 N. J. Eq., page 530, the court says, at page 540:

"The retention of the injunction will be of little bene-
"fit to complainant while it will work serious annoyance
"to defendants. An injunction ought not to be granted
"where the benefit secured by it to one party is but of lit-
"tle importance, while it will operate oppressively and to
"the great annoyance and injury of the other party, un-
"less the wrong complained of is so wantom and unpro-
"voked in its character as properly to deprive the wrong-
"doer of the benefit of any consideration as to its injuri-
"ous consequences."

In the case of Isenberg v. East India Company, 33 L. J. Equity, page 392, Lord Chancellor Westbury states the same principle, as follows:

"To what end then am I to exercise a jurisdic-
"tion, which, in such a case as this, would simply be mis-
"chievous to the defendants, without being attended with
"corresponding benefit to the plaintiff, unless, indeed, I
"could approve of the plaintiff's taking advantage of the
"mischief and loss that the defendants would have to
"sustain in order to aggravate and exaggerate his claim
"for pecuniary compensation."

The principle that a court of equity will always intervene to prevent a nuisance which goes to the substance of a freehold, is not universal in its application, and will always be modified to suit the particular facts and conditions before the court for determination.

This has been cautiously and justly set forth by the Supreme Court of California in the following language:

"Whether ditch properties in the mineral regions of
"this state, although conceded to be real estate, used as
"it is for purposes of trade and commerce, is to be re-
"garded by courts of equity with the same measure of
"favor which is bestowed by them upon land which is
"held and cherished by the owner for ITSELF, and not
"merely put to use for an ulterior object, admits at least
"of serious doubt. Such ditches are more or less tem-
"porary. They are not valuable *as land*. Their value
"depends entirely upon the demand for water, and when
"the demand has ceased they become worthless. The
"qualities upon which the common law grounds its pe-

"culiar fondness for land, and the reasons why courts "of equity will interfere to protect it, would therefore "seem to be measureably wanting. (See the case of "Humphries v. Brogden, 12 Queen's Bench, Ad. & Ellis, "739; and Gibson v. Puchta, 33 Cal. 316.)"

Clark v. Willett, 35 Cal. at p. 549.

VII.

The injunction was in effect a mandatory injunction. A court of equity rarely decrees a mandatory injunction requiring the performance of constructive in contradistinction to destructive work, and will never decree a mandatory injunction when the work commanded to be done requires in its execution such skill, judgment and technical ability as was required to close the intakes complained of.

The remedy by injunction is wholly preventive, prohibitory or protective. And this is true whether the form of injunction be prohibitive or mandatory. A court of equity will not interpose for the sole purpose of redressing a wrong. It has been said that the chancellors borrowed the writ from the old Roman "interdict".

The Supreme Court of Illinois, following the notion contained in the word "interdict" says:

"It comes between the complainant and the injury he "fears or seeks to avoid. If the injury be already done "the writ can have no operation for it cannot be applied "correctively so as to remove it."

Wangelin v. Goe, 50 Ill. 459, at p. 469.

The same court again says:

"Resort cannot be had to the writ of injunction, di-

"rectly or indirectly, to obtain affirmative relief, but its "office and use are to afford preventive relief as to "wrongs and injuries threatened and which the party "fears."

Baxter v. Board of Trade, 83 Ill. 146.

The result desired must always be the prevention of a wrong. Sometimes a mere prohibition will not serve to accomplish such desired result; and the fact that technical prohibition will not suffice to stand between the complainant and his injury forces a court of equity, in order to accomplish the desired end, to issue what is termed, a "mandatory injunction". The purpose, however, is always to prevent a wrong, and never to redress an injury.

The familiar case calling for the exercise of a mandatory injunction is the building of a dam, the effect of which is to flood or injure complainant's property. In such a case it was said by the court:

"It is not to correct a wrong of the past, in the sense "of redress for the injury already sustained, but to pre- "vent further injury. The injury consists in the over- "flow of the lands of the plaintiff. It was not alone the "building of the dam that caused the injury, but its *"maintenance or continuance,* which is a part of the act "complained of; and its maintenance can only be stopped "so as to prevent its injury by its removal. The removal "of the dam, wrongfully constructed, is necessary for "and incidentally involved in the preventive redress "which the law authorizes."

Troe v. Larson, 84 Ia., 649; 35 Am. St. Rep. 336; 51 N. W. 179.

Pomeroy commenting upon this decision says:

"On this ground the use of mandatory injunctions is "resorted to whenever necessary to give the full relief "to which the plaintiff is entitled. In such cases it is gen- "erally *destructive acts requiring no supervision* that are "required, as the removal of an object that is, or causes "a nuisance."

5 Pomeroy Eq. Jur., 1 Pomeroy Eq. Rem., Sec. 533, p. 913.

As observed by Pomeroy in the same section, it is true that occasionally constructive acts are required, but always in cases of continuing nuisances, and as has been heretofore argued, the injunctive relief is based upon a *meditated maintenance* of the wrongful act.

An examination of all of the authorities by Pomeroy in support of the principles laid down in such section, and a diligent examination of all the authorities upon the subject by counsel, has failed to disclose a single case in which a mandatory injunction was issued unless the party against whom it ran was by express or implied affirmative conduct maintaining the condition which superinduced the injury which the court sought to prevent.

There is a line of authorities in which mandatory injunctions have been issued to public service corporations, to compel the performance of statutory regulations or of duty to the public, in which the basis of the writ was akin to the basis of the writ of mandamus, which, however, have no application to conditions as presented upon this appeal; and in many of such cases the courts of equity have refused to intervene, and have

intimated that the proper remedy was the legal remedy of mandamus.

The distinction between ordering by mandatory injunction constructive work as contradistinguished from destructive work is clearly defined in the case of

Doran v. Carrol, 11 Irish Chancery, page 379.

The subject matter of that case was a wall which the defendant had destroyed. The complainant sought by mandatory injunction, to compel him to rebuild it. It would seem that these facts are very similar in principle to the facts in this case. The chancellor said:

"It (the destruction of the wall) has been accom-
"plished and it is now entirely a matter for the consid-
"eration of a court at law. The wall is prostrate and
"there is an end of it. It is clearly not a case in which
"a mandatory injunction to rebuild the wall could be
"granted."

Perhaps the controlling reason why courts of equity are reluctant to order constructive work by mandatory injunction is, that a chancellor will not undertake to compel the doing of an affirmative act unless the work to be done is definitely described and easily ascertained and so capable of being readily performed as to render possible the execution of the decree by the marshal if the defendant refused, or from lack of money or any cause was unable to perform.

Back of this consideration is the fundamental principle that a court of equity will not decree the performance of a vain and idle act. It will at times compel the performance of some ordinary act, such as the construction of a switch, or the building of a bridge over a

ditch or stream, acts, whose performance under prevailing mechanical conditions is as simple as acts of destruction. But no court of equity would undertake to compel the construction, we will say, of a suspension bridge over the Hudson river, or a tunnel beneath it.

A temporary injunction was issued in May and the California Development Company was then under order to close these intakes.

Rockwood testified that he did all that engineering skill and prudence and abundant labor and material could do, to close the intake, and failed.

Duryea, on the other hand, testified that Rockwood's methods were incompetent, and that his (Duryea's) plan for closing the intake was the sound and skillful one. He did not divulge to Randolph nor to the court what his plan was. He said: "In a contract like that (closing the intake) the principal stock in trade is the method."

When the first efforts had proved a failure, Rockwood devised a new method. It was to construct a wooden gate of sufficient dimensions to carry the entire flow of the river at low water; to make the floor of the gate lower than the bottom of the intake; the entire river, seeking the lowest point, would flow through the gate and leave the intake dry; then the intake could be rapidly closed, the gate shut, and the waters would flow past the intake and find their way to the Gulf.

Edlinger, the engineer for the Southern Pacific thought that Rockwood's plan would fail. Schuyler thought that Rockwood's plan would succeed; Edlinger had his plan, which consisted of a diagonal dam from

a point above the intake to an island opposite it, which would divert the river through the channel on the other side of the island, away from the intake and thence to the Gulf.

Was Randolph in contempt when he adopted Rockwood's plan? Was it contempt to refuse to accept Duryea's proposition? Should the California Development Company in order to escape contumacy have ordered a board of examiners to ascertain whether Duryea, Rockwood or Schuyler or Edlinger or Randolph was the most skilled engineer? Was the defendant complying with the order when, with feverish haste, constructing Rockwood's gate, and was it in contempt when its officers stood upon the banks of the river and saw what was left of the Rockwood gate floating toward the Salton Sink?

Duryea appeared to criticize Rockwood and Edlinger for spending some of their nights at Yuma, and testified:

"I think there should have been very complete jurisdiction (supervision?) by all of the higher officials; they should have kept in constant touch with the work and should have been on the work a large part of the time. It was a serious question." [P. 330]

This testimony of Duryea's, of itself, suffices that the bill should be dismissed.

Courts of all jurisdictions have united in the doctrine *that courts of equity will decree the performance of no work which requires continuous supervision.*

Precisely the same principle guides a court of equity

in such cases as guides it in suits for specific performance.

"The injunction prayed for in this case would, if "granted, accomplish all that a decree for specific per- "formance could effect, and therefore all the principles "which apply to the case of a bill for specific performance "apply with equal force to the case of a bill for perpetual "injunction, when that injunction accomplishes all the "objects which could be accomplished by a successful "prosecution of a formal bill for specific execution."

Whalen v. B. & O. R. R., 69 Atl., p. 391, at p. 394.

"It is contended that the agreement is of such a char- "acter that a court of equity will not attempt to "decree its specific performance. * * * It is urged "that the contract is one in which the skill, expe- "rience and cultivated judgment of the parties must be "exercised in order to confer upon either of them the "substantial benefit of its performance. * * * When "the act to be performed depends upon the skill, expe- "rience, and cultivated judgment of the person who has "obligated himself for its performance, courts of equity "will not undertake to coerce a literal and perfunctory "performance which would be but a vain and idle act.

"It is one thing, however, to stop a party from doing "that which he cannot rightfully do, and another to un- "dertake to compel him to do an act involving the ex- "ercise of faculties and judgment which are peculiar and "personal to himself; and the argument from inconven- "ience which may properly be invoked when the court is "asked to decree a specific performance would, if it

"should be controlling when the court is asked to re-
"strain the doing of an unlawful act, apply to all cases
"in which the corrective power by injunction is exer-
"cised."

Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 24 Fed., at p. 521.

"Another serious objection to a decree for specific per-
"formance is found in the peculiar character of the con-
"tract itself, and in the duties which it requires of the
"owners of the quarries * * * they involve skill, personal
"labor and cultivated judgment."

Marble Co. v. Ripley, 10 Wall., 339, at p. 358.

See to the same effect:

Bradfield v. Dewell, 48 Mich. 9; 11 N. W. 760;

Certainly the defendant's obligation by reason of the acts complained of could not have been stronger than if it had entered into a solemn contract to close the intakes.

Let us suppose that Randolph on behalf of the California Development Company had accepted Duryea's offer. It appears at page 368. He was to turn ninety per cent of the water back into the old bed of the river and to keep it there for ten days for $135,000, and the free use of all materials that were upon the ground or in transit, and the free use of the plant which was on the ground or in transit. He refused to disclose the nature of his plan.

Had such a contract been made, and Duryea failed, would it be argued that a suit for specific performance to compel him to perform his contract, could have been maintained? Certainly no authority can be adduced in

support of such contention, and if not, then how may a court of equity issue a mandatory injunction against the California Development Company?

VIII.

The court had no jurisdiction to decree an injunction in this suit in the absence of a determination at law that the acts of the defendant complained of constituted a nuisance.

Pomeroy suggests that a problem of procedure may be presented to the equity courts when an injunction is sought by a plaintiff in whose favor the fact that a nuisance exists has never been determined.

"In such case", he asks, "should the court of equity pass on the questions of law or fact raised? Or should it refuse its extraordinary relief until the plaintiff has procured a judgment of a court of law in his favor?

1 Pomeroy's Eq. Rem., Sec. 519.

After discussion of this problem at some length he concludes that the rule that the question on which the legal rights depend, should be first tried at law "still persists in most jurisdictions in which it has not been abrogated by statute."

Idem, Sec. 522.

It will be borne in mind that the acts of the California Development Company were not *per se* a nuisance. Intake No. 1 had been opened in December, 1902, and it had done no injury to anybody, either actually or theoretically. Intake No. 2 did no injury. Complainant admits that intake No. 3, under ordinary conditions, would have done no injury, and constituted no nuisance.

Defendant contends that Intake No. 3 never did work a nuisance; that there was no nuisance; that the property of complainant was inundated by reason of the acts of God.

It is an admitted fact that prior to the message sent by the President to Congress in January, 1907, Intake No. 3 had been entirely closed, and has remained closed ever since, by means of a dam of solid and impregnable rock; but that after all three intakes had been thus closed the floods swept over, not only the banks of the river, but the levees which had been constructed, and cut another intake through which the floods continued to pour into the canals of the defendant and upon the lands of the complainant. It was then a question of fact whether the defendant had committed any act which caused or even contributed to the injury of complainant's property. The flooding existed at the time of the commencement of the suit. Complainant claimed that it was a nuisance created by defendant. This the defendant denied.

It is the accepted law, that under such conditions, when what is claimed to be a nuisance already exists, and the claim that the act complained of constitutes a nuisance is controverted, a court of equity cannot act until such disputed claim is determined by a court of law.

"When the alleged nuisance is prospective and threat-
"ened, a court of equity may interfere to prevent its be-
"ing brought into existence. When what is claimed to
"be a nuisance already exists, the general rule is that
"the fact that it is a nuisance must be established by a

"suit at common law before a court of equity will in-
"terfere to abate. Varney v. Pope, 60 Me. 192. This
"has always been the doctrine in this state. (Cases
"cited.)

"It is true that this general rule is subject to excep-
"tions. In cases of pressing or imperious necessity, or
"where the right is in danger of being injured or de-
"stroyed, or there is no adequate remedy at law, equity
"will interfere."

Tracy v. LaBlanc, 36 Atl., p. 399, at p. 400.

"And a court will always act with reluctance in abat-
"ing a nuisance and seldom, if ever, until it is regularly
"found to be such by a jury."

Dunning v. City of Aurora, 40 Ill. 481, at p. 486.

"But where the thing is not itself noxious, but only
"something which may according to circumstances prove
"so, then the court will refuse to interfere until the mat-
"ter has been tried at law. * * *"

Kennedy v. Etiwan, 17 S. C. 411.

The idea contended for is suggested by the Supreme Court of the United States in the case of Northern Indiana Railroad Co. against Michigan Central Railroad Company, *supra,* in the following language:

"In the course of such an investigation it may be
"necessary to protect an issue to try the title of the par-
"ties or to assess the damage complained of in the bill."
(P. 244.)

To the same effect see:

Wangelin v. Goe, 50 Ill. 459;

Roath v. Driscoll, 20 Conn. 533, at p. 539;
Harrelson v. K. C. Co., 52 S. W. 368;
Erwin v. Dixion, 50 U. S. 10;
Wood v. McGrath, 24 Atl. 682;
Burnham v. Kempton, 44 N. H. 78, at pp. 95 and 97;
Brooks v. Norcross, 4 Fed. Cases, 294, No. 1957.

IX.

There is no allegation or proof that the defendant when able to control the waters of the Colorado river, at any time so used them as to permit waste water to flow upon the lands of the complainant. Therefore, inasmuch as the headgate had been constructed and the intakes closed prior to the trial and decree, whatever may have been the power of the court to retain jurisdiction for the purpose of awarding judgment for damages, it had no power to decree an injunction and thereby restrain the defendant from performing acts which it had never done or threatened to do.

The learned district judge sets forth in his conclusions the grounds for the injunction which was decreed, in the following language:

"If, when the suit was brought, there were grounds "for injunction, such grounds have not been removed by "the destruction of complainant's works and by the clos- "ing of defendant's intakes. Complainant is entitled to "have its freehold protected, without regard to the "amount of the damage threatened, otherwise the over- "flow sought to be abated might, by prescription, ripen "into a servitude upon the land. Furthermore, the pres- "ent safeguards against overflows may be but temporary,

"while the complainant's remedial rights, if it has any, "include permanent relief." (P. 129.)

The first sentence of the above quotation, is founded upon the assumption that the defendant had threatened or intended to construct further intakes of dangerous character. There being no allegation or proof upon which to base such assumption it follows that the closing of the intakes by the defendant before the decree did remove the grounds for the injunction if any existed at the time of the commencement of the suit.

The statement that "the present safeguards against overflows may be but temporary," has no foundation in the evidence. It was conclusively established that the intakes which caused the trouble were definitely closed.

Complainant's right to an injunction does not necessarily follow from its right "to have its freehold protected." Complainant's right to have its freehold protected was probably co-existent with its title to the same, but its right to an injunction against the defendant can only exist as a result of acts by defendant invading or threatening to invade such right.

The acts alleged are that defendant constructed intakes without making "provision for control or regulation of the amount of water diverted by it into said intakes." The complainant offered evidence tending to prove this allegation but offered no evidence whatever as to any other improper or unlawful act of defendant; and so far as we can see, counsel has made no other charge against defendant than such acts.

All of these intakes had prior to the decree, been closed and a new intake had been constructed and in its

construction, provision was made for the control and regulation of the water diverted by it.

The court, therefore, had no right to assume that the defendant having power to regulate and control the intakes for the water diverted by it, will wantonly, or otherwise, so control them as to suffer waste water to flood complainant's property.

If, as a matter of fact, since the construction of the present intakes, defendant has suffered or caused waste water to flow into the Salton sea, the complainant in order to protect its freehold, must bring a suit for an injunction based upon such acts by the defendant. Or if such acts were committed prior to the decree the complainant should have filed a supplemental bill stating such facts and have offered evidence to establish them. Upon the present record it was error for the court to find, without accusation, that the defendant meditated wrong-doing and to issue its injunction accordingly.

It seems unreasonable to assume that unpreventable flood water, flowing through the intakes on defendant's naked land, could ripen into an easement in favor of the defendant, when the allegation of the defendant in its answer and the evidence of all parties, were that the defendant had nothing actively to do with such unpreventable flooding.

X.

The Imperial water companies and the Mexican corporation were necessary parties to the suit.

In reenforcement of the authorities cited in appellant's opening brief, and in reply to the argument of appellee in opposition to the above proposition, we submit the following quotation from the case of the Northern Indiana Railway company against the Michigan Railroad company, *supra:*

"This question is, therefore, vitally interesting to the "New Albany company; and by the bill we are called to "decide that question, although that company is not "made a party to the suit. It is impossible to grant the "relief prayed, without deeply affecting the New Al- "bany company. If their charter should be held good, "as claimed by that company, an injunction against the "defendants would materially injure the New Albany "company. * * *

"The Act of 1839 provides, that 'where in any suit " 'at law or in equity commenced in any court of the " 'United States, there shall be several defendants, any " 'one or more of whom shall not be inhabitants of, or " 'found within the district, jurisdiction may be enter- " 'tained, but the judgment or decree shall not conclude " 'or preclude other parties. And the nonjoinder of par- " 'ties who are not inhabitants, or found within the dis- " 'trict, shall constitute no matter of abatement, or other " 'objection to said suit.'

"The provision of this Act is positive, and in ordi- "nary cases no difficulty could arise in giving effect to

"it; but in a case like the present, where a court cannot "but see that the interest of the New Albany company "must be vitally affected, if the relief prayed for by the "complainant be given, the court must refuse to exercise "jurisdiction in the case, or become the instrument of "injustice. In such an alternative we are bound to say, "that this case is not within the statute. On both the "grounds above stated we think that the circuit court "has no jurisdiction."

It was inconsistent with the theory of organization of the Imperial Water companies that their stock should be held permanently or for any length of time, by the California Development company and their policies or actions directed by it.

The farmers who were to become the ultimate owners of the stock of the Imperial Water companies depended for existence upon the ability of the defendant to furnish the water companies with water, by diverting the same from the Colorado river, and their interest, to borrow the language of the court above quoted, "must "be vitally affected if the relief prayed by the complain-"ant be given."

See also

State v. Goodnight, 11 S. W. 119.

An injunction commanding the California Development company to construct headgates upon Mexican soil was in effect a command to the Mexican corporation, which alone had the necessary authority from the Mexican government.

Where a foreign corporation representing the power of a foreign government for diversion of water of a

river on foreign soil by intakes built therein, is a necessary party to any suit requiring a modification of such intakes by other acts of construction on foreign soil and cannot be made a party by any service of process, the jurisdiction of equity is lost and the bill must be dismissed.

Ribon v. Railroad Companies, 16 Wall. 446;
Barney v. Baltimore, 6 Wall. 280;
Thayer v. Life Assurance Company, 112 U. S. 717;
Shields v. Barrow, 17 Howard 130.

XI.

The court erred in deciding that the jurisdiction of the Circuit Court, sitting as a court of equity to restrain the wrongful diversions of water, draws to it the cognizance of the damages, if any, which had resulted from such diversions.

This point has been elaborately discussed in appellant's opening brief and but little can be added to what has been there said.

The precise question seems to have been decided by the Supreme Court of Rhode Island in a case which does not appear to have been cited upon such brief and the attention of the court is here invited to it. It was a suit for an injunction to restrain the obstruction of a flow of water and the complainant asked for damages occasioned by the past obstruction. The court sustained a demurrer, saying:

"The complainant has his action on the case at com-
"mon law for such injuries and the jury trial is the more

"appropriate proceeding for the recovery of damages. "There is no analogy between this case and the infringe- "ment of a patent where equity holds the user of anoth- "er's invention as a trustee, accountable for profits "earned. Here the damages are unliquidated and can- "not be made the subject of an accounting."

Miner v. Nichols, 52 Atlantic 893.

See also

Stevenson v. Morgan, 64 N. J. Eq. 219.

It would seem that the right of the complainant, in a suit for an injunction, to recover a money judgment by way of damages for acts done prior to the injunction rests upon the principle that a court of equity will not permit the defendant to profit by his own wrong; and the court will award the complainant as damages, the value of such benefits as may have accrued to defendant by reason of such wrongful acts. The theory is that the defendant having secured such benefits by such wrongful acts, holds them as a trustee *per fraudem* for the complainant. Where the damages are unliquidated, in other words *yhere the complainant has been damaged, but where the defendant has not profited by the wrongful acts,* the elements of such trusteeship do not exist and a court of equity does not draw to it the cognizance of such damages.

In conclusion, appellant submits that without regard to matters of technical procedure, it is obvious upon the whole record, that this was not a proper case for injunctive relief.

At the time this suit was brought and certainly long prior to the time when complainant by filing its bill in the Circuit Court, elected to proceed in equity, complainant must have realized that its property was, or surely would be destroyed and that it had in fact, if not in theory, a complete remedy at law. Why then, did complainant elect to prosecute its suit for damages in this indirect fashion? It must have appreciated that its property was lost beyond peradventure and that no number of injunctions could as a matter of fact, protect it from destruction. It cared nothing then and it cares nothing now for its barren freehold. It is of no consequence to it whether the evaporation of Salton sea be retarded six months or a year.

Why then did complainant deliberately and after defendant's demurrer interposed, insist upon the equity side of the court as its forum? Why did eminent counsel, with a clear field ahead for an action at law, "take chances"? It would seem that complainant must have been animated by some undisclosed purpose. It may be that it feared a jury trial and undertook by indirection to deprive defendant of its right to one.

Or still other reasons may exist.

At the earlier stages of this litigation, the financial condition of the defendant was necessarily precarious. It was confronted by a condition of facts almost without parallel.

As stated by the president in his message to congress:

"After the mischief became apparent, strenuous ef-

"forts were made by the California Development com-
"pany to close the intake, but these were without suc-
"cess." (P. 2091.)

"The people in their desperation were reported as
"having tried to sell bonds secured by their property, in
"order to give to the California Development company
"one million dollars to assist in repairing the break."
(Pp. 2092-3.)

"Again, the owners of the property in Imperial Val-
"ley, both farmers and townspeople, together with the
"Southern Pacific company and the California Develop-
"ment company have combined to call upon the govern-
"ment for a contribution to assist the California De-
"velopment company to the extent of erecting permanent
"works to insure protection for the future." (P. 2093.)

The defendant has been compelled to expend, and therefore to borrow, millions of dollars in order to save the people of this valley from ruin. The Southern Pacific company which stood in the breach and furnished the defendant the means wherewith to meet the situation and close the intake, has no recourse for the millions thus expended except those of a general creditor of the defendant, and has no hopes of being reimbursed in any of these enormous expenditures except through the operations of the defendant's plans of irrigation.

The injunction granted by the decree in this action, if construed according to the contention of appellee, will in effect, close the headgates at the Colorado river, and put a total end to irrigation, except by permission of complainant.

Such an injunction, as complainant must know, is of

no practical value to it. It has value only as a weapon whereby complainant can coerce the Southern Pacific company and the settlers in the valley, all innocent and fellow sufferers, to pay or settle this enormous judgment. If perchance, this is the motive which inspires the complainant so actively to seek equitable relief, its course is even more inequitable than the alleged criminal negligence of the luckless Rockwood.

No reason exists or has existed why defendant should be deprived of its constitutional right to a trial by jury.

The decree should be reversed and the bill dismissed.

Tucson, Arizona, October 1, 1908.

Respectfully submitted,

EUGENE S. IVES,

Of Counsel for Appellant.